



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO.338 OF 2014

CAROLYNE KHASANDI OCHAMIPETITIONER

VERSUS

JACOB MASINDE WANJALAOBJECTOR/APPLICANT

J U D G M E N T

Introduction

1. The deceased herein, Justo Sifuna Masinde a teacher by profession died on 18/12/2013 in what the Objector claims were unclear circumstances. According to the Petitioner, the deceased was murdered. At the time of his death, the deceased was 47 years old and was survived by his wife, Carolyne Khasandi Ochami who is the Petitioner in these proceedings. He was also survived by a daughter Joy Makokha he left behind 4 parcels of land.

- i) Butsotso/Ingotse/2528
- ii) Butsotso/Ingotse/2528
- iii) Butsotso/Ingotse/2955 and
- iv) Butsotso/Ingotse/2636

After the death of the deceased the Petitioner commenced this succession cause by filing the petition on 02/05/2014. To support her petition in her capacity as widow of the deceased, the Petitioner annexed to her papers a letter date 02/05/2014 from the Chief of North Butsotso location, confirming that the Petitioner was wife to the deceased and that Joy Makokha was daughter to the deceased. She also annexed a copy of the Certificate of marriage dated 16/04/1994, showing that the two got married in the Africa For Christ Ministry, church at Lubinu High School Hall in Kakamega. The original Certificate of Marriage was produced in evidence during the Petitioner's testimony. The Petitioner also produced other documents showing that the deceased paid dowry for her. She also produced Certificate of Birth; DEx 18 for Joy Makokha.

The Objector

2. Before the Grant of Letters of Administration Intestate (Form P & A 41) could be issued, the Objector, Jacob Masinde Wanjala who is father to the deceased filed an objection on grounds that the deceased was not married as at the time of his death. That though the deceased had married the Petitioner in or about the year 1997, that marriage, which had been childless came to an end in 2009 so that by the time the deceased died in 2009, he had been separated from the Petitioner for

about 5 years. The Objector also claims that the sole reason why the Petitioner filed this cause was to swindle the deceased's family of the deceased's property.

The Evidence

3. The objection proceeded by way of oral evidence. During his testimony, the Objector denied any knowledge of the Petitioner as wife to deceased. He also refuted the Petitioner's contention that she had a child with the deceased, born on 18/12/1996. He told the Court that he did not want the Petitioner to inherit the 4 parcels of land (supra) left behind by the deceased, claiming that in fact the Petitioner is already married to somebody else. During cross examination, the Objector denied there having been any dowry discussions, contrary to the evidence adduced by the Petitioner. He also alleged that in fact by the time he died, the deceased had 4 wives with children who he said were at home. He also made unsubstantiated claims that the Petitioner was responsible for the deceased's death. The Objector produced a letter dated 10/10/2014 which confirmed the deceased as having been an active member of the Spiritual Life Holy Community Church up to the time he died though the Objector told the Court that the letter was intended to prove that the deceased and the Petitioner were separated as at the time of death of the deceased.
4. The Objector called Wycliffe Wawire Masinde as PW2. He supported the Objector's allegations. PW2 also testified that during the deceased's funeral, many women brought children claiming they were children of the deceased. He also accused the Petitioner of having squandered the deceased's property after the deceased died. He also testified during cross examination that the deceased and the Petitioner did not live a happy life and that by the time the deceased died, the two had been separated for 12 years. On his allegations that the Petitioner had sold the deceased's property, he was hard put when he failed to produce documents to support his claims.
5. The Petitioner testified as DW1 and called her father Henry Mbulishe Shihunwa as DW2. Both of them confirmed the fact of marriage between the deceased and the Petitioner; they also confirmed the fact of discussion and payment of dowry by the deceased. They also confirmed the fact of a child having been born between the deceased and the petitioner. They both denied the Objector's allegations that they had anything to do with the death of the deceased. Both the Petitioner and DW2 told the Court that the Objector has no right to administer the deceased's estate.

Issues and the Law

6. From the pleadings and the evidence the only issue that arises for determination is who, between the Objector and the Petitioner ranks higher in priority and therefore entitled to administer the deceased's estate. To determine this issue, this Court must establish whether the Petitioner was wife to the deceased.
7. In her testimony to the Court and as pleaded in her papers, the Petitioner adduced evidence of proof of marriage vide the Certificate of marriage. DExhibit 1. Though the Objector denied under oath that the Petitioner was wife to the deceased he testified that the deceased and the Petitioner were indeed married. What the Objector and his witness wanted the Court to believe is that by the time of death the deceased and the Petitioner were no longer man and wife but they did not prove or substantiate their claims. The fact remained that the Petitioner has proved by documentary evidence that he was wife to the deceased. That evidence has not been challenged by the Objector.
8. Having thus established that the Petitioner was wife to the deceased how does she rank in priority as concerns the deceased's estate. In the instant case, the interest of the Objector as far as the deceased's estate is concerned falls in the category of other relatives. The law provides that no other relation of the deceased shall have a share in the deceased's estate so long as there is a surviving spouse or surviving child. In this case, the Objector can only hope to benefit from the deceased's estate if he applies to the Court for provision in accordance with Section 26 of the law of Succession Act Section 39 of the Act sets out the rights of other relatives, so that where the deceased died intestate leaving neither spouse nor child then such deceased's estate shall devolve upon the relatives in the following order of priority.
 - a. Father; or if dead

b. Mother; or if dead

c. Brothers and sisters and any child or children of deceased brothers and sisters in equal share, or if none,

d. Half brothers and half-sisters and any child or children of deceased half-brothers and half-sisters in equal share, or if none,

e. The relatives who are in the nearest degree of consequently up to and including the sixth degree, in equal share.

So, in the present case, the Objector, PW2 and any other brothers of the deceased could only take a part of the deceased's estate if the deceased had left neither spouse nor child.

Conclusion

9. It follows from the above that the Objector's case has no merit. While I may sympathize with his feelings. Those feelings of his are not evidence. The Petitioner has proved that her marriage to the deceased was in fact as at 18/12/2013 when the deceased, if being of no consequence that the couple may have had the usual problems during the life time of the deceased. Such differences, if they ever existed, do not alter the fact that the Petitioner is wife to the deceased and that being the case, the Petitioner is the rightful person to administer the estate of the deceased. DW2 complained that the Petitioner proceeded with the succession cause without notifying other members of the family. In my considered view such a complaint would have had merit if the estate in contention was that of the Objector herein. The only other person the Petitioner has to account to is the child of the deceased who is already over 18 years of age.
10. For the above stated reasons, the Objector's objection and cross Petition dated 28/08/2014 and 26/08/2014 be and are hereby dismissed but with no order as to costs. The Grant of Letters of Administration Intestate pursuant to the Petition herein filed on 02/05/2014 and duly advertised vide Kenya Gazette Notice No.335 of 2014 dated 21/05/2014 shall issue to the Petitioner, Carolyne Khasandi Ochami.
11. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 2nd day of June 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Jacob Masinde Wanjala – present in person for objector/Applicant

Mrs. Muleshe For Petitioner/Respondent

Mr. Lagat - Court Assistant